

Washington, D.C. 20505

OGC 78-2246

7 April 1978

MEMORANDUM FOR: The Assistant to the President for National Security Affairs

SUBJECT : S.2525 - Proposed Intelligence Charter Legislation

1. As you will recall, by your memorandum of 6 December 1977 you asked that I assume primary responsibility for the coordination and development of the authoritative Administration position concerning the proposed intelligence charter legislation, reserving for the National Security Council's Special Coordination Committee final review and approval.

2. At a meeting of the National Foreign Intelligence Board on 14 February 1978, based upon that charge and my further conversations with you on this subject, I instructed the various entities of the Intelligence Community to analyze thoroughly the legislation as introduced on 9 February and to submit resulting comments and suggestions on 28 March. Many comments have been received, with more to come, and have been reviewed briefly. In addition, I have discussed with the Deputy Director of Central Intelligence, my Deputy for Resource Management and my General and Legislative Counsels, the complexities of the proposed legislation and the steps that are necessary to ready ourselves for the legislative ordeal that lies ahead.

3. The attached memorandum discusses in summary fashion the major issues which the proposed legislation presents and requests that the appropriate Department Heads join in an organizational arrangement to permit us jointly to address these issues forthwith.


STANSFIELD TURNER

Attachment

OGC:ARC:lw

Distribution:

Original - Addressee

(1 cy of attachment to each addressee)

1 - DDCI w/att

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1 - Acting Legislative Counsel

1 - NFAC

1 - DDO

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1 - Inspector General

1 - Comptroller

1 - General Counsel

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7 April 1978

MEMORANDUM FOR: Secretary of State
Secretary of Treasury
Secretary of Defense
Attorney General
Secretary of Energy
Director of the Office of Management
and Budget
Assistant to the President for
National Security Affairs

SUBJECT : S.2525 - Proposed Intelligence Charter Legislation -
Organizational and Substantive Considerations

I. General Background

1. In keeping with the charge from the President's Assistant for National Security Affairs that I coordinate the development of Administration positions regarding the many issues presented by the proposed intelligence charter legislation, at the NFIB meeting of 14 February, I requested comments on that legislation from your representatives. In response my Office has received a large number of comments, with more to come, ranging from broad, general policy considerations of large organizational or operational importance to editorial and grammatical suggestions. Summarized in this paper, for your consideration, are the major issues which are presented by the bill and will require resolution prior to further progress in this regard. Those issues which cannot be dealt with at the working level, will, of necessity, require decisions by the SCC, and in some cases the NSC or the President.

II. Organization

2. Initially, however, we must organize ourselves to begin the process of correlating, analyzing and resolving the hundreds of issues, both large and small, which have been identified and others which are not evident today but will rise to the surface as our understanding of the content and intent of this attempt at comprehensive reformation and regulation of the intelligence activities of the government develops more fully over time. The legislative process is likely to be lengthy and complex with multiple hearings by various committees.

proposal Approved For Release 2004/08/19 : CIA-RDP81M00980R000800030086-7 thorough, coordinated approach to the legislation and to provide for an ongoing means for examination and resolution of the issues which have been and will be raised during this process, I plan to establish the following framework.

3. Mr. Anthony Lapham, Counsel to the Director of Central Intelligence, as well as General Counsel of the Central Intelligence Agency, shall act in the former capacity to direct the organization and functioning of a senior charter legislation working group to be comprised of a principal legal officer from the Department of State, the Department of Defense, the Department of Justice, and the Central Intelligence Agency, those being the entities with the foremost equities in the ultimate shape of this legislation. This group shall develop as it sees fit, and preside over, an appropriate organization of representatives drawn from each of the named entities, as well as the Department of the Treasury, the Department of Energy, the National Security Council, the Office of Management and Budget, the Federal Bureau of Investigation, the National Security Agency, the Drug Enforcement Administration, the DOD reconnaissance offices, and the military intelligence services. These representatives may be arranged by the senior working group into lesser working groups by specialized area, by portions of the bill, or in some other form, may be assigned tasks individually, or may be organized in whatever other manner the senior group believes will most effectively accomplish the purpose of developing issues and positions. Issues and other matters which cannot be resolved at the lower working levels, or which require more authoritative consideration, will be brought to the senior working group for review and, to the extent possible, resolution. This working group shall be responsible for periodically reporting to the member's principals and the NSC Special Coordination Committee concerning the status of this process and the legislation, and shall present coordinated positions, policy matters, and unresolved major issues, with appropriate recommendations, to the SCC for consideration and resolution. The heads of the entities represented on the senior working group are requested to furnish to Mr. Lapham by 15 April the name of the legal officer who shall participate in the group. Mr. Lapham will convene the group shortly thereafter to discuss the functioning of that group and the supporting organization.

III. Major Substantive Issues

4. Summarized below are the major areas of concern developed in our preliminary analysis of the comments received to date, and which should form the basis for initial deliberations by the senior working group structure described above and should be brought to the SCC for consideration shortly.

5. While complete comments have not yet been received from all the NFIB entities, in general there do not appear to be deep, irreconcilable differences between the intelligence agencies concerning the proposed charter legislation. Several general areas of concern appear to be shared widely including:

a. The most basic issue concerns the acceptable scope and detail of legislation concerning the world of foreign intelligence and counterintelligence. The FBI has suggested that the existing bill is so far removed from its preference as to suggest the need to draft a counter-bill. The wisdom and practicality of this approach as an alternative, or in addition, to revising the SSCI bill should be determined.

b. An additional area of concern is the elaborate and encumbering system of oversight and reporting requirements which S.2525 would visit upon the intelligence agencies of the government. Attached is a compilation and description of the 68 major reporting requirements which have been identified in the text of the various titles. The effects of this scheme would appear to constitute a tremendous burden on existing resources and a major obstacle to the smooth functioning of the Intelligence Community. These reporting requirements raise ancillary questions as to whether, for example, it is proper for Congress to insert itself into the day-to-day affairs of the Executive Branch and whether the decision-making processes of the President may be required to include the National Security Council and certain specified factors and considerations. It may also be argued that the extensive congressional involvement by way of establishing arbitrary yet specific investigative thresholds and time limits constitutes execution of the laws, reserved to the Executive by Article II of the Constitution, rather than enactment of the laws of the U.S. Finally, the requirement for prior reporting of agreements with foreign intelligence services is most troubling and has already been the subject of some concern to such services.

c. The organization of the Intelligence Community as envisioned in S.2525 must also be treated as a matter for consideration. The inter-relationships embodied in the bill deserve careful review. For example, the Attorney General would be required to approve a wide variety of FBI activities and to annually review all its "intelligence activities," a review encompassing some 20-30,000 actions each year according to the FBI. The relationship between the control and review authorities and responsibilities of the Attorney General and the DNI concerning counterintelligence and national intelligence activities is unclear. The interaction of the centralized signals intelligence function given the National Security Agency and the specialized activities in that area of, for example, the FBI (internal security), CIA (clandestine collection operations), and the Air Force (counterintelligence and law enforcement) should be clarified. The difficult question of the demarcation between law enforcement and intelligence or counterintelligence activities must be raised.

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There are some points that should be made. First, the bill should be placed in a separate title rather than referenced somewhat briefly in this proposal. To a large extent these issues may be a matter of definitional precision, but the proliferation of definitions in the name of precision is not the answer as is illustrated by the fact that in Title I there are now 15 definitional variations on the theme of intelligence and related activities.

d. The difficult yet vital issues relating to legislative protection for intelligence sources and methods, and criminal or civil sanctions for their unauthorized disclosure, persist. These questions have yet to be resolved satisfactorily within the Administration despite a months-long study, and the recent SSCI subcommittee hearings served largely to establish only that a real problem exists. The charter process seems to present a suitable opportunity to make progress in this area.

e. Title III presents the wealth of issues associated with the use of electronic surveillance against U.S. persons for foreign intelligence purposes, not only as to the largely agreed upon provisions of S. 1566 concerning domestic activities which it incorporates, but also the principles to be applied to operations abroad, matters upon which the Administration itself has not yet reached agreement. The procedures and standards to be required in instituting such surveillance, the duration of approved surveillance, and the treatment of information acquired from such surveillance abroad, are all matters of large import and concern which will require extensive discussion. In addition, the existing bill subjects unconsented physical searches and mail opening involving U.S. persons, both at home and abroad, to similar requirements for judicial approval. Issues abound here such as whether judicial or Attorney General approval is required, whether a criminal standard is necessary or advisable, and the problems posed by the unavoidable entanglement of foreign intelligence services in these activities abroad.

f. Further issues are presented by the review authorities assigned to the Department of Justice and the Comptroller General by the bill. The practicality of requiring an almost constant presence by the Justice Department and the advisability of authorizing not only detailed audits but also program reviews by the Comptroller General, at the request of any congressional committee or on personal initiative, must be carefully considered.

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g. The question of appropriate review, approval and reporting of special activities and sensitive collection activities is a major one. The mechanisms and findings which are required by the bill may be inherently incompatible with the nature of the very activities which are at issue.

h. Another area of debate is the various restrictions and prohibitions which would be imposed upon intelligence activities by this bill. The draft legislation raises knotty issues regarding, among other things, relations with members of the clergy, representatives of the news media, and individuals participating in U.S. Government-supported exchange programs, the extent and nature of intelligence collection activities initiated, and the techniques utilized, against U.S. persons, as well as the protections to be afforded to foreign persons in the U.S. Each of these areas will be the subject of extensive discussions and, along with restrictions and prohibitions which are less subject to disagreement, e.g., human experimentation, will require carefully drafted language if retained in the bill so as not to destroy all flexibility or bar legitimate intelligence activities.

6. There are a multitude of issues concerning the precise wording of the various provisions of the bill and lesser policy issues. For instance, the bill provides joint and several liability on the part of employees and the U.S. for several types of violations. The proper Administration position in this regard must be determined in view of the inconsistency of this provision with the premises of the Federal Tort Claims Act and Administration consideration of a bill to insulate employees from personal liability. Other issues concern proper grade levels, terms in office, and requirements for senatorial consent, where provided for intelligence agency officials. The Administration's preferred counterintelligence, counterterrorism and anti-narcotics structure must be developed in order to engage in meaningful discussions of those provisions of the bill. The questions attendant to any fair consideration of security, cover, and proprietaries must be addressed to some degree. This list of "minor" matters could go on and on but would serve little purpose here other than to further illustrate the depth and breadth of the task ahead. The senior working group should move expeditiously to focus and narrow these issues for the SCC.


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